

COMMITTEE FOR PUBLIC COUNSEL SERVICES

PERFORMANCE STANDARDS

GOVERNING THE REPRESENTATION OF CLIENTS IN CHILD WELFARE APPEALS

These standards are intended for use by the Committee for Public Counsel Services in evaluating, supervising and training counsel assigned pursuant to G.L. c. 211D. Counsel assigned pursuant to G.L. c. 211D must comply with these standards and the Massachusetts Rules of Professional Conduct. In evaluating the performance or conduct of counsel, the Committee for Public Counsel Services will apply these standards and the Massachusetts Rules of Professional Conduct, as well as all CPCS policies and procedures included in this manual and other CPCS publications.

Appellate counsel in child welfare appeals are bound by the within Performance Standards and also by all applicable Performance Standards Governing Representation of Children and Parents in Child Welfare Cases (“Trial Standards”) as set forth in the CPCS Assigned Counsel Manual (1999), which are fully incorporated herein.

1. Compliance with Massachusetts Rules of Appellate Procedure. Appellate counsel shall comply in all respects with the Massachusetts Rules of Appellate Procedure.
2. Work with a Mentor. Appellate counsel assigned to work with a mentor shall work with such mentor as required by the CAFL Co-Director overseeing the appellate panel. Appellate counsel shall abide by the terms and conditions of the mentor program as may, from time to time, be issued by such CAFL Co-Director.
3. Initial Obligations of Appellate Counsel. Immediately upon receipt of the notice of assignment, appellate counsel shall: (a) file an appearance in the appropriate court; (b) communicate with the client, if appropriate for the client’s age, to inform the client of the assignment; (c) communicate with trial counsel to inform him or her of the assignment, provide him or her with copies of appellate counsel’s appearance and request information and materials necessary for the appeal; and (d) determine whether a stay of the judgment or decree of the trial court should be sought pending appeal. In the event a stay should be sought, counsel shall immediately seek one in accordance with Mass. R. App. P. 6.
4. Initial Meeting with Client. Appellate counsel shall, as soon as practicable after the assignment, meet with the client. At such initial meeting, appellate counsel shall determine the client’s position and goals in the appeal. Appellate counsel is not bound by the determinations of the client’s position and goals made by trial counsel. Appellate counsel shall independently determine his or her client’s position and goals on appeal as set forth in Trial Standards 1.6 and 1.7, and should be aware of the potential for conflicts

as set forth in Trial Standard 1.4.

5. Ongoing Communications with Client. Appellate counsel shall confer with the client, if appropriate for the client's age, and with trial counsel, if appropriate, about the issues that may be raised in the client's appeal. Appellate counsel shall keep the client informed of all significant developments in the client's case. Appellate counsel shall respond in a timely manner to all communications from the client, provided that such communications are of a reasonable volume and at reasonable intervals. Where the client is a child, appellate counsel shall communicate with the child to the extent necessary to maintain a normal attorney-client relationship with the child. See Trial Standards 1.5 and 1.6.
6. Communications with Trial Counsel. Appellate counsel shall inform the client's trial counsel of all significant developments in the case, including proposed settlement of the case, trial motions (as set forth in section 7 below), dismissal of the appeal, docketing of the appeal in the appellate court and the resolution of the appeal. Appellate counsel shall cooperate with trial counsel in furtherance of the client's position and goals in the proceeding. See Trial Standard 7.1(d).
7. Motions. Appellate counsel shall timely file in the appropriate court all motions necessary or advisable to preserve and perfect the client's appellate rights. Appellate counsel who are not assigned to represent the client in the trial court shall not engage in motion practice in the trial court unless such motion practice relates to assembly of the record on appeal, a stay pending appeal, dismissal of an appeal, or a request for new trial or relief from judgment. Appellate counsel may, with prior authorization from the CAFL Co-Director, file and argue other motions.
8. Issues on Appeal. Appellate counsel should pursue all appropriate issues for appeal. Appellate counsel should pay particular attention to whether a claim as to ineffective assistance of trial counsel may form the basis of an appeal. If the client insists on having appellate counsel brief a contention that, in the judgment of appellate counsel, cannot be supported by a rational argument, appellate counsel shall (a) immediately inform and consult with the CAFL Co-Director and, if the Co-Director concurs, (b) inform the client of the client's rights with respect to such contention pursuant to Commonwealth v. Moffett, 383 Mass. 201, 203-09 (1981); (c) provide the client with a copy of the Moffett opinion; and (d) if the client thereafter wishes to invoke his or her Moffett rights with respect to such contention, comply in all respects with the guidelines set forth in Moffett. See Care and Protection of Valerie, 403 Mass. 317 (1988).
9. Briefs. Appellate counsel, whether representing an appellant or appellee, shall file a brief on behalf of his or her client. The brief of appellate counsel shall be of high quality and shall conform in all respects with the applicable Rules of the Massachusetts Rules of Appellate Procedure. Appellate counsel may join in the brief of another party, in part or

in full, to the extent the client and such other party have an identity of issues on appeal; provided, however, that appellate counsel shall be responsible for ensuring the timely filing of any brief in which counsel has joined.

10. Copy of Brief to Client and Co-Director. Appellate counsel shall transmit to the client, if appropriate for the client's age, and the CAFL Co-Director a copy of the brief filed on the client's behalf. Appellate counsel shall also transmit to the client, if appropriate for the client's age, a copy of the brief(s) of other parties and copies of all other substantive documents pertaining to the appellate proceedings.
11. Oral Argument. Appellate counsel shall inform the client, if appropriate for the client's age, and CAFL Co-Director of the date, time and place scheduled for oral argument of the appeal as soon as the appellate counsel receives notice thereof from the appellate court. Oral argument of the appeal on behalf of the client shall not, absent the express approval of the client and the CAFL Co-Director, be waived with respect to any case.
12. Decision of Appellate Court. Appellate counsel shall promptly inform the client, if appropriate for the client's age, of the decision of the appellate court in the client's case and shall transmit to the client, if appropriate for the client's age, and the CAFL Co-Director a copy of the decision.
13. Further Appellate Review. If the decision of the Appeals Court is adverse to the client, appellate counsel shall promptly inform the client, if appropriate for the client's age, of his or her right to make application to the Supreme Judicial Court for further appellate review of the case. If the client requests that such application be made, appellate counsel shall prepare and timely file on the client's behalf such application.
14. Federal Appellate Review. Appellate counsel must obtain the approval of the client and the CPCS Chief Counsel before seeking appellate review in the federal appellate courts. Whether or not to seek the approval of the Chief Counsel for federal appellate review is reserved to counsel's discretion. Approval of the Chief Counsel is subject to his or her discretion.
15. Conclusion of Representation. Appellate counsel's representation of the client ends as of the earlier of (a) withdrawal of the appeal, (b) dismissal of the appeal, absent appeal from such dismissal, (c) entry of an order striking appellate counsel's appearance, absent appeal from such order, or (d) final resolution of the appeal, including remand for a new trial. The CAFL Co-Director may, at his or her discretion, subsequently re-open a Notice of Assignment of Counsel that has been closed pursuant to this section.